Supreme Court, U.S.
FILED
NOV 9 1985
JOSEPH F. SPANIOL, JR
CLERK

No. 85-350

In The

Supreme Court of the United States

October Term, 1985

JOHN WALRAVEN FARLEY, III,

Petitioner,

vs.

LENA FARLEY ROBERTS,

Respondent.

BRIEF IN OPPOSITION TO FARLEY'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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RESPONDENT'S COUNTERPOINT

1. Can a person who receives either Air Force disability retirement or Veterans' Administration disability compensation enter into any binding contract that obligates him to pay money?

LIST OF INTERESTED PARTIES

1. John Walraven Farley, III, Petitioner.
2. Lena Farley Roberts, Respondent.

TABLE OF CONTENTS

Pages

Respondent's Counterpoints i

List of Interested Parties ii

Table of Contents iii

Table of Authorities iv

Reference to Official and Unofficial Opinions Below 1

Statement of Jurisdiction 2

Constitutional Provisions and Statutes 2

Statement of the Case 2

Summary of Argument 2

Argument:

A. A Veteran May Contract To Make Payments To Former Spouse The Amount Of Which Is Based In Part On Amount Received Of Air Force Disability Retirement. 3

Restatement of A 3

Argument Under A 3

B. A Veteran May Contract To Make Payments To Former Spouse The Amount Of Which Is Based In Part On Amount Received Of Veterans Administration Disability Retirement. 5

Restatement of B 5

Argument Under B 6

Conclusion 7

TABLE OF AUTHORITIES

Pages

CASES:

McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728 (1981) 4, 5

Wissner v. Wissner, 339 U.S. 926, 70 S. Ct. 619 (1950) 6

Underhill v. Underhill, 614 S.W.2d 178 (Tex. Civ. App.—Houston 1981) n.r.e. 4

STATUTES AND OTHER AUTHORITIES:

Title 10 U.S.C. §1408 ..... 2, 3

Title 28 U.S.C. §1257 2

Title 38 U.S.C. §3101 ..... 3, 6

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REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

The Petitioner's petition correctly states: the official and unofficial Opinions in the Texas Courts.

STATEMENT OF JURISDICTION

The Petitioner's petition correctly states the action of the Supreme Court of Texas. Respondent contests the jurisdiction of this Honorable Court under 28 U.S.C. 1257, for the validity of no statute or treaty of the United States has been drawn into question by the actions of the Texas courts in connection with this case.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES

The Petitioner's petition correctly reflects the constitutional provisions and statutes upon which he relies.

———o———

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct in stating the nature of the case with the following corrections or modifications:

1. The settlement agreement referred to is properly styled "Property Settlement Agreement," not "Community Property Agreement."

———o———

SUMMARY OF ARGUMENT

(A) The trial court did not err in reforming the contract between Petitioner and Respondent and awarding money damages to Respondent because the trial court did not characterize Petitioner's Air Force disability retirement as community property in violation of 10 U.S.C. §1408.

(B) The trial court did not err in reforming the contract between Petitioner and Respondent and awarding money damages to Respondent because the trial court did not characterize Petitioner's Veterans' Administration disability retirement as community property and its action did not result in an assignment of this retirement or an "attachment, levy, or seizure" of it in violation of 38 U.S.C. §1301.

ARGUMENT

A. A Veteran May Contract To Make Payments To Former Spouse The Amount Of Which Is Based In Part On The Amount Of Air Force Disability Retirement Received.

Restatement of A

The trial court did not err in reforming the contract between Petitioner and Respondent and awarding money damages to Respondent because the trial court did not characterize Petitioner's Veterans' Administration disability compensation as community property in violation of 10 U.S.C. §1408.

Argument Under A

This is a simple suit for reformation of a contract and damages for the breach thereof. Respondent has not asserted a community property right to Petitioner's Air Force disability retirement payments and Petitioner's Veterans' Administration disability retirement payments. The trial court did not divide these payments as community

property. Further, an action for the enforcement of a contract such as the one entered into by Petitioner and Respondent is not even a proceeding under the Texas Family Code, which governs community property division upon divorce. *Underhill v. Underhill*, 614 S.W.2d 178 (Tex. Civ. App.-Houston 1981) n.r.e.

Petitioner receives payments from two different sources. First, he receives Air Force disability retirement. Second, he receives Veterans' Administration disability retirement. Since these forms of retirement pay are treated differently by the case law and statutes, they will be dealt with separately, beginning first with the Air Force disability retirement.

McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728 (1981) held that military nondisability retirement is not divisible in state court divorce proceedings. It is true, as Petitioner points out, that there is nothing in the court's analysis that would indicate that it would have held differently concerning military disability retirement. But *McCarty* does not address the question of whether or not a veteran can by contract agree to make payments to his former spouse when the amount of those payments is based upon the amount of money received by the veteran each month. And *McCarty* certainly does not limit the ability of a court in a state that does allow alimony to order a veteran receiving such retirement to make alimony payments even if the retirement were his only source of income, and the contract issue here is essentially a private contract providing for alimony.

Petitioner points out that subsequent to *McCarty* Congress enacted the Uniformed Services Former Spouses

Protection Act (Pub. L. No. 97-252) authorizing state courts to divide "disposable" retired or retainer pay upon divorce and that the legislative history seems to state that the act only applies with respect to the treatment of non-disability military retired pay or retainer pay. Petitioner further correctly notes that a reading of the act itself discloses that Congress has excluded military disability pay from division by state courts.

But this argument is beside the point. As noted with regard to *McCarty*, it happens that in this case the Texas state courts did not divide the disability payments and so this act does not apply. Petitioner simply agreed to pay Respondent a sum of money each month equal to one-half of his military retirement pay. At the time the agreement was entered into the only military retirement Petitioner was receiving was his Air Force disability retirement, which he is again receiving. Nothing in *McCarty* or the Uniformed Services Former Spouses Protection Act would have prevented him from so doing.

In sum, it is clear that that portion of the judgment which is based upon Air Force disability retirement is valid.

B. A Veteran May Contract To Make Payments To Former Spouse The Amount Of Which Is Based In Part On The Amount Of Veterans' Administration Disability Retirement Received.

Restatement of B

The trial court did not err in reforming the contract between Petitioner and Respondent and awarding money damages to Respondent because the trial court did not

characterize Petitioner's Veterans' Administration disability retirement as community property and its action did not result in an assignment of this retirement or an "attachment, levy, or seizure" of it in violation of 38 U.S.C. § 1301.

Argument Under B

Petitioner, during a portion of the period which was the subject of this suit, was drawing Veterans' Administration disability retirement. V.A. retirement is the product of a different scheme and is the subject of a different case law than military retirement. Petitioner cites *Wissner v. Wissner,* 339 U.S. 926, 70 S.Ct. 619 (1950) to the effect that, because of 38 U.S.C. § 3101, which forbids the assignment of V.A. compensation and exempts it from "attachment, levy, or seizure," states courts have been denied the power or jurisdiction to make community property divisions of veterans' benefits. However, as already noted, the Texas state courts did not make any community property division of Petitioner's V.A. compensation.

Recognizing this, Petitioner then cites several cases that supposedly show that one may not by a Property Settlement Agreement contract to make payments dependent upon one's V.A. compensation. But the cases are not in point. They all involve disputes as to the assignment of the beneficiary of veterans' insurance policies, that is, as to whether payment is to be made directly to one person as beneficiary or to another. No such assignment was agreed to in this case. Petitioner's V.A. retirement payments are to continue to be made directly to him. He is simply to pay Respondent an amount that makes allowance for this V.A. compensation income. If followed to its log-

ical conclusion, the reasoning adopted by Petitioner would lead to the position that a person drawing V.A. compensation could not enter into any binding agreement to pay money because the money paid might come from his V.A. compensation. Such is surely not the law. One may contract to pay money without effecting an assignment or an "attachment, levy, or seizure." There is nothing in any of the cases cited by Petitioner to indicate that in a state which allows alimony there is any prohibition of a court ordering alimony to be paid by a person receiving such compensation even if it is the only income that he receives.

In sum, in the present case the V.A. compensation exempt statutes are not compromised in any way, nor has the V.A. compensation been divided by the Court as community property. The Court has simply enforced a contract and given a judgment for damages for the breach of that contract.

CONCLUSION

Respondent respectfully prays that Petitioner's Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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